

1 ROBERT C. SCHUBERT S.B.N. 62684  
2 WILLEM F. JONCKHEER S.B.N. 178748  
3 DUSTIN L. SCHUBERT S.B.N. 254876  
4 SCHUBERT JONCKHEER KOLBE & KRALOWEC LLP  
5 Three Embarcadero Center, Suite 1650  
6 San Francisco, California 94111  
7 Telephone: (415) 788-4220

8  
9  
10 *Counsel for Plaintiff Hal K. Levitte*  
11 *[Additional Plaintiffs' Counsel on Signature Page]*

12  
13  
14  
15  
16 IN THE UNITED STATES DISTRICT COURT FOR THE  
17 NORTHERN DISTRICT OF CALIFORNIA  
18  
19 SAN JOSE DIVISION

20 HAL K. LEVITTE, Individually and On  
21 Behalf of All Others Similarly Situated,

22 Plaintiff,

23 v.

24 GOOGLE INC., a Delaware Corporation,

25 Defendant.

26 CASE NO. C 08-03369 JW

27 HON. JAMES WARE

28 **JOINT CASE MANAGEMENT  
CONFERENCE STATEMENT**

**Date: March 2, 2009**

**Time: 10:00 a.m.**

**Hon. James Ware**

29 CASE NO. C 08-03452 JW

30 HON. JAMES WARE

31 RK WEST, INC., a California Corporation  
32 d/b/a Malibu Wholesale, individually and on  
33 Behalf of All Others Similarly Situated,

34 Plaintiff,

35 v.

36 GOOGLE INC., a Delaware Corporation;  
37 and DOES 1 through 10, inclusive,

38 Defendants.

39 CASE NO. C 08-03888 JW

40 HON. JAMES WARE

41 PULASKI & MIDDLEMAN, LLC,  
42 individually and on behalf of all others  
43 similarly situated,

44 Plaintiff,

45 v.

46 GOOGLE INC., a Delaware Corporation,

47 Defendant.

48  
49  
50  
51  
52  
53  
54  
55  
56  
57  
58  
59  
60  
61  
62  
63  
64  
65  
66  
67  
68  
69  
70  
71  
72  
73  
74  
75  
76  
77  
78  
79  
80  
81  
82  
83  
84  
85  
86  
87  
88  
89  
90  
91  
92  
93  
94  
95  
96  
97  
98  
99  
100  
101  
102  
103  
104  
105  
106  
107  
108  
109  
110  
111  
112  
113  
114  
115  
116  
117  
118  
119  
120  
121  
122  
123  
124  
125  
126  
127  
128  
129  
130  
131  
132  
133  
134  
135  
136  
137  
138  
139  
140  
141  
142  
143  
144  
145  
146  
147  
148  
149  
150  
151  
152  
153  
154  
155  
156  
157  
158  
159  
160  
161  
162  
163  
164  
165  
166  
167  
168  
169  
170  
171  
172  
173  
174  
175  
176  
177  
178  
179  
180  
181  
182  
183  
184  
185  
186  
187  
188  
189  
190  
191  
192  
193  
194  
195  
196  
197  
198  
199  
200  
201  
202  
203  
204  
205  
206  
207  
208  
209  
210  
211  
212  
213  
214  
215  
216  
217  
218  
219  
220  
221  
222  
223  
224  
225  
226  
227  
228  
229  
230  
231  
232  
233  
234  
235  
236  
237  
238  
239  
240  
241  
242  
243  
244  
245  
246  
247  
248  
249  
250  
251  
252  
253  
254  
255  
256  
257  
258  
259  
260  
261  
262  
263  
264  
265  
266  
267  
268  
269  
270  
271  
272  
273  
274  
275  
276  
277  
278  
279  
280  
281  
282  
283  
284  
285  
286  
287  
288  
289  
290  
291  
292  
293  
294  
295  
296  
297  
298  
299  
300  
301  
302  
303  
304  
305  
306  
307  
308  
309  
310  
311  
312  
313  
314  
315  
316  
317  
318  
319  
320  
321  
322  
323  
324  
325  
326  
327  
328  
329  
330  
331  
332  
333  
334  
335  
336  
337  
338  
339  
340  
341  
342  
343  
344  
345  
346  
347  
348  
349  
350  
351  
352  
353  
354  
355  
356  
357  
358  
359  
360  
361  
362  
363  
364  
365  
366  
367  
368  
369  
370  
371  
372  
373  
374  
375  
376  
377  
378  
379  
380  
381  
382  
383  
384  
385  
386  
387  
388  
389  
390  
391  
392  
393  
394  
395  
396  
397  
398  
399  
400  
401  
402  
403  
404  
405  
406  
407  
408  
409  
410  
411  
412  
413  
414  
415  
416  
417  
418  
419  
420  
421  
422  
423  
424  
425  
426  
427  
428  
429  
430  
431  
432  
433  
434  
435  
436  
437  
438  
439  
440  
441  
442  
443  
444  
445  
446  
447  
448  
449  
450  
451  
452  
453  
454  
455  
456  
457  
458  
459  
460  
461  
462  
463  
464  
465  
466  
467  
468  
469  
470  
471  
472  
473  
474  
475  
476  
477  
478  
479  
480  
481  
482  
483  
484  
485  
486  
487  
488  
489  
490  
491  
492  
493  
494  
495  
496  
497  
498  
499  
500  
501  
502  
503  
504  
505  
506  
507  
508  
509  
510  
511  
512  
513  
514  
515  
516  
517  
518  
519  
520  
521  
522  
523  
524  
525  
526  
527  
528  
529  
530  
531  
532  
533  
534  
535  
536  
537  
538  
539  
540  
541  
542  
543  
544  
545  
546  
547  
548  
549  
550  
551  
552  
553  
554  
555  
556  
557  
558  
559  
560  
561  
562  
563  
564  
565  
566  
567  
568  
569  
570  
571  
572  
573  
574  
575  
576  
577  
578  
579  
580  
581  
582  
583  
584  
585  
586  
587  
588  
589  
590  
591  
592  
593  
594  
595  
596  
597  
598  
599  
600  
601  
602  
603  
604  
605  
606  
607  
608  
609  
610  
611  
612  
613  
614  
615  
616  
617  
618  
619  
620  
621  
622  
623  
624  
625  
626  
627  
628  
629  
630  
631  
632  
633  
634  
635  
636  
637  
638  
639  
640  
641  
642  
643  
644  
645  
646  
647  
648  
649  
650  
651  
652  
653  
654  
655  
656  
657  
658  
659  
660  
661  
662  
663  
664  
665  
666  
667  
668  
669  
670  
671  
672  
673  
674  
675  
676  
677  
678  
679  
680  
681  
682  
683  
684  
685  
686  
687  
688  
689  
690  
691  
692  
693  
694  
695  
696  
697  
698  
699  
700  
701  
702  
703  
704  
705  
706  
707  
708  
709  
710  
711  
712  
713  
714  
715  
716  
717  
718  
719  
720  
721  
722  
723  
724  
725  
726  
727  
728  
729  
730  
731  
732  
733  
734  
735  
736  
737  
738  
739  
740  
741  
742  
743  
744  
745  
746  
747  
748  
749  
750  
751  
752  
753  
754  
755  
756  
757  
758  
759  
760  
761  
762  
763  
764  
765  
766  
767  
768  
769  
770  
771  
772  
773  
774  
775  
776  
777  
778  
779  
770  
771  
772  
773  
774  
775  
776  
777  
778  
779  
780  
781  
782  
783  
784  
785  
786  
787  
788  
789  
790  
791  
792  
793  
794  
795  
796  
797  
798  
799  
800  
801  
802  
803  
804  
805  
806  
807  
808  
809  
8010  
8011  
8012  
8013  
8014  
8015  
8016  
8017  
8018  
8019  
8020  
8021  
8022  
8023  
8024  
8025  
8026  
8027  
8028  
8029  
8030  
8031  
8032  
8033  
8034  
8035  
8036  
8037  
8038  
8039  
8040  
8041  
8042  
8043  
8044  
8045  
8046  
8047  
8048  
8049  
8050  
8051  
8052  
8053  
8054  
8055  
8056  
8057  
8058  
8059  
8060  
8061  
8062  
8063  
8064  
8065  
8066  
8067  
8068  
8069  
8070  
8071  
8072  
8073  
8074  
8075  
8076  
8077  
8078  
8079  
8080  
8081  
8082  
8083  
8084  
8085  
8086  
8087  
8088  
8089  
8080  
8081  
8082  
8083  
8084  
8085  
8086  
8087  
8088  
8089  
8090  
8091  
8092  
8093  
8094  
8095  
8096  
8097  
8098  
8099  
80100  
80101  
80102  
80103  
80104  
80105  
80106  
80107  
80108  
80109  
80110  
80111  
80112  
80113  
80114  
80115  
80116  
80117  
80118  
80119  
80120  
80121  
80122  
80123  
80124  
80125  
80126  
80127  
80128  
80129  
80130  
80131  
80132  
80133  
80134  
80135  
80136  
80137  
80138  
80139  
80140  
80141  
80142  
80143  
80144  
80145  
80146  
80147  
80148  
80149  
80150  
80151  
80152  
80153  
80154  
80155  
80156  
80157  
80158  
80159  
80160  
80161  
80162  
80163  
80164  
80165  
80166  
80167  
80168  
80169  
80170  
80171  
80172  
80173  
80174  
80175  
80176  
80177  
80178  
80179  
80180  
80181  
80182  
80183  
80184  
80185  
80186  
80187  
80188  
80189  
80190  
80191  
80192  
80193  
80194  
80195  
80196  
80197  
80198  
80199  
80100  
80101  
80102  
80103  
80104  
80105  
80106  
80107  
80108  
80109  
80110  
80111  
80112  
80113  
80114  
80115  
80116  
80117  
80118  
80119  
80120  
80121  
80122  
80123  
80124  
80125  
80126  
80127  
80128  
80129  
80130  
80131  
80132  
80133  
80134  
80135  
80136  
80137  
80138  
80139  
80140  
80141  
80142  
80143  
80144  
80145  
80146  
80147  
80148  
80149  
80150  
80151  
80152  
80153  
80154  
80155  
80156  
80157  
80158  
80159  
80160  
80161  
80162  
80163  
80164  
80165  
80166  
80167  
80168  
80169  
80170  
80171  
80172  
80173  
80174  
80175  
80176  
80177  
80178  
80179  
80180  
80181  
80182  
80183  
80184  
80185  
80186  
80187  
80188  
80189  
80190  
80191  
80192  
80193  
80194  
80195  
80196  
80197  
80198  
80199  
80100  
80101  
80102  
80103  
80104  
80105  
80106  
80107  
80108  
80109  
80110  
80111  
80112  
80113  
80114  
80115  
80116  
80117  
80118  
80119  
80120  
80121  
80122  
80123  
80124  
80125  
80126  
80127  
80128  
80129  
80130  
80131  
80132  
80133  
80134  
80135  
80136  
80137  
80138  
80139  
80140  
80141  
80142  
80143  
80144  
80145  
80146  
80147  
80148  
80149  
80150  
80151  
80152  
80153  
80154  
80155  
80156  
80157  
80158  
80159  
80160  
80161  
80162  
80163  
80164  
80165  
80166  
80167  
80168  
80169  
80170  
80171  
80172  
80173  
80174  
80175  
80176  
80177  
80178  
80179  
80180  
80181  
80182  
80183  
80184  
80185  
80186  
80187  
80188  
80189  
80190  
80191  
80192  
80193  
80194  
80195  
80196  
80197  
80198  
80199  
80100  
80101  
80102  
80103  
80104  
80105  
80106  
80107  
80108  
80109  
80110  
80111  
80112  
80113  
80114  
80115  
80116  
80117  
80118  
80119  
80120  
80121  
80122  
80123  
80124  
80125  
80126  
80127  
80128  
80129  
80130  
80131  
80132  
80133  
80134  
80135  
80136  
80137  
80138  
80139  
80140  
80141  
80142  
80143  
80144  
80145  
80146  
80147  
80148  
80149  
80150  
80151  
80152  
80153  
80154  
80155  
80156  
80157  
80158  
80159  
80160  
80161  
80162  
80163  
80164  
80165  
80166  
80167  
80168  
80169  
80170  
80171  
80172  
80173  
80174  
80175  
80176  
80177  
80178  
80179  
80180  
80181  
80182  
80183  
80184  
80185  
80186  
80187  
80188  
80189  
80190  
80191  
80192  
80193  
80194  
80195  
80196  
80197  
80198  
80199  
80100  
80101  
80102  
80103  
80104  
80105  
80106  
80107  
80108  
80109  
80110  
80111  
80112  
80113  
80114  
80115  
80116  
80117  
80118  
80119  
80120  
80121  
80122  
80123  
80124  
80125  
80126  
80127  
80128  
80129  
80130  
80131  
80132  
80133  
80134  
80135  
80136  
80137  
80138  
80139  
80140  
80141  
80142  
80143  
80144  
80145  
80146  
80147  
80148  
80149  
80150  
80151  
80152  
80153  
80154  
80155  
80156  
80157  
80158  
80159  
80160  
80161  
80162  
80163  
80164  
80165  
80166  
80167  
80168  
80169  
80170  
80171  
80172  
80173  
80174  
80175  
80176  
80177  
80178  
80179  
80180  
80181  
80182  
80183  
80184  
80185  
80186  
80187  
80188  
80189  
80190  
80191  
80192  
80193  
80194  
80195  
80196  
80197  
80198  
80199  
80100  
80101  
80102  
80103  
80104  
80105  
80106  
80107  
80108  
80109  
80110  
80111  
80112  
80113  
80114  
80115  
80116  
80117  
80118  
80119  
80120  
80121  
80122  
80123  
80124  
80125  
80126  
80127  
80128  
80129  
80130  
80131  
80132  
80133  
80134  
80135  
80136  
80137  
80138  
80139  
80140  
80141  
80142  
80143  
80144  
80145  
80146  
80147  
80148  
80149  
80150  
80151  
80152  
80153  
80154  
80155  
80156  
80157  
80158  
80159  
80160  
80161  
80162  
80163  
80164  
80165  
80166  
80167  
80168  
80169  
80170  
80171  
80172  
80173  
80174  
80175  
80176  
80177  
80178  
80179  
80180  
80181  
80182  
80183  
80184  
80185  
80186  
80187  
80188  
80189  
80190  
80191  
80192  
80193  
80194  
80195  
80196  
80197  
80198  
80199  
80100  
80101  
80102  
80103  
80104  
80105  
80106  
80107  
80108  
80109  
80110  
80111  
80112  
80113  
80114  
80115  
80116  
80117  
80118  
80119  
80120  
80121  
80122  
80123  
80124  
80125  
80126  
80127  
80128  
80129  
80130  
80131  
80132  
80133  
80134  
80135  
80136  
80137  
80138  
80139  
80140  
80141  
80142  
80143  
80144  
80145  
80146  
80147  
80148  
80149  
80150  
80151  
80152  
80153  
80154  
80155  
80156  
80157  
80158  
80159  
80160  
80161  
80162  
80163  
80164  
80165  
80166  
80167  
80168  
80169  
80170  
80171  
80172  
80173  
80174  
80175  
80176  
80177  
80178  
80179  
80180  
80181  
80182  
80183  
80184  
80185  
80186  
80187  
80188  
80189  
80190  
80191  
80192  
80193  
80194  
80195  
80196  
80197  
80198  
80199  
80100  
80101  
80102  
80103  
80104  
80105  
80106  
80107  
80108  
80109  
80110  
80111  
80112  
80113  
80114  
80115  
80116  
80117  
80118  
80119  
80120  
80121  
80122  
80123  
80124  
80125  
80126  
80127  
80128  
80129  
80130  
80131  
80132  
80133  
80134  
80135  
80136  
80137  
80138  
80139  
80140  
80141  
80142  
80143  
80144  
80145  
80146  
80147  
80148  
80149  
80150  
80151  
80152  
80153  
80154  
80155  
80156  
80157  
80158  
80159  
80160  
80161  
80162  
80163  
80164  
80165  
80166  
80167  
80168  
80169  
80170  
80171  
80172  
80173  
80174  
80175  
80176  
8017

1  
2 JIT PACKAGING, INC., Individually and  
on behalf of all others similarly situated,

3 Plaintiff,

4 v.

5 GOOGLE INC., a Delaware Corporation,

6 Defendant.

CASE NO. C 08-04701 JW

HON. JAMES WARE

7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 Pursuant to Rule 26(f) of the Federal Rules of Civil Procedure,<sup>1</sup> Local Rules 16-9 and 26-1,  
2 and this Court's Standing Order, the parties submit the following Joint Case Management  
3 Conference Statement. The parties met and conferred pursuant to Rule 26(f) on February 2, 2009.  
4 During this conference, the parties discussed the items required under Rule 26 and the Standing  
5 Order, as well as Initial Disclosures and discovery. This joint statement was prepared based on  
6 those discussions.

7 **1. Jurisdiction, Service, and Venue.**

8 A total of four related cases were filed against defendant Google Inc. ("Google"). This  
9 Court related the cases by order dated November 3, 2008 on Google's administrative motion to relate  
10 the cases.

11 This Court has subject matter jurisdiction over these actions pursuant to 28 U.S.C. § 1332(d).

12 No issues exist regarding personal jurisdiction or venue.

13 Three of the four complaints have been served. The complaints filed by plaintiffs Hal K.  
14 Levitte, RK West, Inc. and Pulaski & Middleman, LLC have been served, and Google has answered  
15 each complaint. JIT Packaging, Inc. has not yet served Google with its complaint.

16 **Plaintiffs' position:** The JIT Packaging, Inc. complaint was originally filed in the Northern  
17 District of Illinois, case number 08 CV 4543. Google appeared and by stipulation of the parties the  
18 case was voluntarily dismissed on October 8, 2008 and refiled in the Northern District of California  
19 on October 10, 2008.

20 Counsel for Google acknowledges below that on February 2, 2009 that it agreed to accept  
21 service of the JIT Packaging, Inc. complaint and on February 4, 2009 counsel for JIT Packing, Inc.  
22 mailed the waiver of summons request. Under Rule 4(m) if the complaint is not served within 120  
23 days, the Court has the discretion to either dismiss the complaint without prejudice or order service  
24 within a date certain. Given Google's statement below that it is still willing to waive summons and  
25 accept service and having received the request for waiver of summons on February 12, 2009, in the

---

26  
27  
28 <sup>1</sup> All rule references are to the Federal Rules of Civil Procedure unless noted otherwise.

1 interest of expediency it is requested the Court deem the service effective under Rule 4(m) as  
2 plaintiff will file the executed waiver immediately after receiving the same from counsel for Google.

3       **Defendant's position:** JIT Packaging, Inc. filed its complaint on October 10, 2008, and  
4 therefore, its deadline to serve the complaint under Rule 4(m) was February 9, 2009. Plaintiff failed  
5 to serve the complaint by that deadline despite Google's counsel offering to accept service by mail  
6 and notice of acknowledgement of receipt or similar federal procedure on October 15, 2008 and  
7 February 2, 2009, respectively, and Plaintiff having the ability to serve Google directly. Plaintiff did  
8 not, however, serve Google or its counsel before February 9, 2009, and therefore, the complaint  
9 should be dismissed without prejudice under Rule 4(m).<sup>2</sup>

10       **2.     Facts.**

11       **Plaintiffs' position:** Plaintiffs are customers of Google's AdWords program. Pursuant to the  
12 AdWords program, advertisers contract with Google to have their advertisements placed on "high-  
13 quality websites, news pages, and blogs that partner with Google to display targeted AdWords ads"  
14 or on search results pages. Advertisers are generally charged on a "per click" basis for  
15 advertisements placed using the AdWords program. Plaintiffs allege that Google has concealed from  
16 and/or misrepresented material information to plaintiffs and the class concerning the Google  
17 AdWords program. In particular, plaintiffs allege that Google places their ads on certain "parked  
18 domain" and "error page" websites without their knowledge or consent, since Google had  
19 represented that the ads would be placed on "high quality websites" or on results pages from Google  
20 searches. Plaintiffs allege that substantial advertising charges incurred by plaintiffs and the class in  
21 connection with these websites are unlawful under California law. Until May 2008, Google actively  
22 concealed the identity of parked pages and error pages that displayed AdWords advertisements, and  
23 did not provide any mechanism by which advertisers could exclude "parked sites" or AdSense for  
24 Errors pages.

25  
26  
27       

---

<sup>2</sup> By letter dated February 4, 2009, but received by Google's counsel on February 12, 2009, JIT  
28 Packaging, Inc. has requested that Google waive service. Although Google will do so, JIT  
Packaging, Inc.'s service is untimely because requesting a defendant to waive service does not toll  
the 120-day service rule, and the waiver is not effective until the plaintiff files the executed waiver.

1                   **Defendant's position:** Google denies that it concealed or misrepresented any material  
2 information or made any false or misleading statements regarding the AdWords program. Plaintiffs  
3 understood and expressly agreed that their advertisements could be placed on: (a) any content or  
4 property provided by Google or (b) any other content or property provided by a third party upon  
5 which Google places ads, which includes "parked domain" and "error page" websites, unless they  
6 opted out of such placement in the manner specified by Google. Further, Google did not make any  
7 guarantees regarding "conversions." Indeed, Google expressly disclaimed any guarantees regarding  
8 conversions, which depend entirely on factors completely out Google's control, such as the highly  
9 idiosyncratic wants, needs, and other circumstances of each internet user, the content and usability  
10 of advertisers' websites, the products and services being offered by the advertisers, and their price.  
11 Also, Plaintiffs' allegations that Google made statements about "high quality" websites are not  
12 sufficient to state a claim because any such statements are actionable puffery, and in any event,  
13 any such representations were not exclusive of other websites in Google's Network. Last, Plaintiffs  
14 have not been actually damaged because they received exactly what they paid for—internet users  
15 saw Plaintiffs' ads, clicked on them, and were directed to Plaintiffs' websites.

16                   **3. Legal issues.**

17                   The legal issues presented in these actions include whether the actions are appropriate for  
18 class treatment, and if so, the scope and definition of the class(es), and whether Google's conduct in  
19 connection with the AdWords program constitutes (1) an unfair business practice under California  
20 Business & Professions Code Section 17200; (2) false advertising under California Business &  
21 Professions Code Section 17500; (3) breach of the contract; or (4) unjust enrichment.

22                   **4. Motions.**

23                   Prior motions – An administrative motion to relate cases was granted on November 3, 2008.

24                   Pending motions – Plaintiffs' unopposed motion to consolidate cases is presently pending  
25 and set for hearing on March 2, 2009 at 9:00 a.m.

26                   Anticipated motions –

27                   **Plaintiffs' position:** Plaintiffs anticipate filing a motion for class certification. Plaintiffs may  
28 file a dispositive motion after the close of discovery. Plaintiffs may also file discovery motions, if

1 required.

2       **Defendant's position:** Google anticipates the following motions: (1) motion to dismiss  
3 plaintiff JIT Packaging, Inc.'s complaint for insufficiency of service if the Court does not do so *sua*  
4 *sponte*; (2) potential motion to dismiss Plaintiffs' consolidated complaint on Rule 12(b) and 9(b)  
5 grounds depending on the allegations and claims asserted; (3) motion to strike jury demand as to  
6 claims under California's Unfair Competition Law or False Advertising law; (4) opposition to  
7 Plaintiffs' anticipated motion for class certification; (5) potential discovery related motions; and (6)  
8 motion for summary judgment.

9       **5. Amendment of pleadings.**

10       If the Court grant plaintiffs' pending motion for consolidation and appointment of lead  
11 counsel, which is scheduled to be heard on March 2, 2009, a consolidated complaint is due to be  
12 filed 45 days after the date of the order, and Google's response thereto is due 45 days after the filing  
13 of the consolidated complaint.

14       The parties agree that it is premature to assess the filing of counterclaims, the dismissal of  
15 certain of plaintiffs' claims, or the addition or dismissal of Google's defenses until the filing and  
16 service of the consolidated complaint and Google's response thereto.

17       **Plaintiffs' position regarding further amendments:** Plaintiffs believe that there should be  
18 no deadline set that limits amendments to the complaint after the filing of the consolidated  
19 complaint, as factual information developed during discovery or even during trial may provide a  
20 basis for further amendments.

21       **Defendant's position regarding further amendments:** Defendant proposes that the  
22 deadline for amending the pleadings be 150 days from the filing of the consolidated complaint.

23       **6. Evidence Preservation.**

24       The parties have agreed and represent that evidence is being preserved, including  
25 electronically-stored material.

26       **7. Disclosures.**

27       **Plaintiffs' position:** Plaintiffs believe that Initial Disclosures should be made now, pursuant  
28 to Rule 26(a)(1)(c) as Google has already answered the three complaints with which it has been

1 served, and the consolidated complaint will be based on the same core facts and circumstances.  
2 Google's position that there should be no Initial Disclosures until after Google has responded to the  
3 consolidated complaint should be rejected, since even if the consolidated complaint contains  
4 additional legal theories, Google has already been apprised of the basic factual issues in dispute.

5 **Defendant's position:** Google proposes that the deadline for making initial disclosures be  
6 set for 15 days after Google's deadline to respond to the consolidated complaint because: (1)  
7 Plaintiffs' have not specified the "who, what, when, where, and how" of the alleged false or  
8 misleading statements as required under Rule 9(b) in the three served complaints and one yet-to-be  
9 served complaint, and therefore, it is unfair that Google would have to make initial disclosures based  
10 on those soon-to-be superseded complaints; (2) Google has not yet responded to the JIT Packaging,  
11 Inc. complaint and only recently received JIT Packaging, Inc.'s request to waive service in that  
12 action; (3) Plaintiffs' proposed consolidated complaint would supersede the four earlier complaints,  
13 and the consolidated complaint would be the operative complaint that frames the issues for  
14 discovery and determines relevance for discovery; and (4) contrary to Plaintiffs' statement that "the  
15 consolidated complaint will be based on the same core facts and circumstances," Plaintiffs refused  
16 during the Rule 26(f) conference to unequivocally state that the consolidated complaint would not  
17 include additional or different factual allegations or legal theories or to identify any anticipated  
18 changes to the allegations or claims.

19 **8. Discovery.**

20 **Plaintiffs' position:** Plaintiffs' position, as presented in the meet and confer, is that  
21 discovery should begin immediately, as Google has already answered the three complaints with  
22 which it has been served, and the consolidated complaint will be based on the same core facts and  
23 circumstances.

24 With respect to Rule 26(f), plaintiffs' discovery will focus on the allegations regarding  
25 Google's AdWords program contained existing complaints. Google has stated that it believes  
26 discovery concerning class certification should proceed first, before merits discovery. Plaintiffs  
27 believe that bifurcation of discovery is unnecessary and will result in waste of resources and delay,  
28 as the distinction between class certification and merits discovery is blurry at best. *Gray v First*

1     *Winthrop Corp.*, 133 F.R.D. 39, 41 (N.D. Cal. 1990). The ultimate factual questions center on  
2 Google’s AdWords program and charges to plaintiffs under this program. These questions are also  
3 germane to class certification.

4           Furthermore, it is highly unlikely that the parties will be able to agree as to what  
5 constitutes appropriate class certification discovery and what should be reserved for merits  
6 discovery. The parties will then be forced to turn to the Court for guidance and to resolve  
7 disputes. In addition, as plaintiffs bear the burden of proof in class certification and the majority  
8 of relevant discovery is in Google’s possession, plaintiffs could potentially be prejudiced by the  
9 inability to obtain discovery that Google claims only relevant to “the merits.”

10          With respect to electronic discovery, the parties have had preliminary discussions  
11 regarding the format of electronic discovery, and have agreed to meet and confer at an appropriate  
12 time to further discuss electronic discovery. With respect to privilege issues, the parties have  
13 agreed to negotiate and draft an appropriate protective order. In light of Google’s posture  
14 regarding discovery, including that it should be put off pending the consolidated complaint,  
15 plaintiffs take no position at this time on whether any changes or limitations should be made on  
16 discovery as provided for in the federal rules or the local rules.

17          **Defendant’s position:** Plaintiffs mischaracterize Google’s position.

18          Google’s position is that initial disclosures should be made 15 days after Google’s deadline  
19 to respond to the consolidated complaint for the reasons set forth in the preceding section.

20          Also it is Google’s position that discovery should be phased between class and merits  
21 discovery. It is common for courts to limit discovery to certification issues, and “[d]iscovery on the  
22 merits of the class claim is usually deferred until it is certain that the case will be allowed to proceed  
23 as a class action.” Schwarzer, et al., Cal. Prac. Guide Fed. Civ. Proc. Before Trial § 10:740 (The  
24 Rutter Group 2009); *see also*, Manual for Complex Litigation (Fourth) § 21.14 (2004). Discovery  
25 should be phased here because: (1) the scope of merits discovery is greatly impacted by whether or  
26 not a class is certified, particularly here where the scope of the action could be either four individual  
27 claims if a class is not certified, or a class involving potentially involving millions of AdWords  
28 advertisers if a class is certified as proposed by Plaintiffs; (2) merits discovery not necessary to

1 determining the Rule 23 requirements is likely to create extraordinary and unnecessary expense and  
2 burden at this stage in the actions; and (3) merits discovery may become unnecessary depending on  
3 the class certification decision in these actions. Plaintiffs' concern over disputes over the class  
4 versus merits distinction is unfounded. The authorities are clear that discovery should be controlled  
5 and limited to class issues and only those merits issues relevant to the Rule 23 analysis. FED. R. CIV.  
6 P. 23, advisory committee's note, 2003 amendments, Subdivision (c)(1); Schwarzer, et al., Cal.  
7 Prac. Guide Fed. Civ. Proc. Before Trial § 10:740 (The Rutter Group 2009); Manual for Complex  
8 Litigation (Fourth) § 21.14 (2004); *see also, In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305,  
9 316-320 (3rd Cir. 2008). If a dispute should arise between the parties as to the scope of class  
10 discovery, the parties are required to first meet and confer in an effort to resolve any such dispute  
11 under Civil L.R. 37-1. If unable to resolve their dispute, the parties can bring an appropriate motion  
12 to the Court to show that the discovery sought is necessary for purposes of Rule 23. Google's  
13 proposal presents a workable, orderly, and efficient framework, and it is one that is contemplated  
14 under Rule 23, practice guides, and the Manual for Complex Litigation.

15 During class certification discovery, Google intends to depose each of the named Plaintiffs  
16 and any experts that Plaintiffs intend to use in support of their motion for class certification. Google  
17 may potentially depose other witnesses listed on Plaintiffs' initial disclosures and if necessary,  
18 unnamed putative class members. Google also intends to propound document requests to each of  
19 the named Plaintiffs. Google proposes that pre-class certification discovery occur according to the  
20 schedule set forth in Section 17 below.

21 For electronic discovery, the parties preliminarily discussed the format for electronic  
22 discovery, and have agreed to meet and confer in an effort reach a stipulation and order governing  
23 electronic discovery formats to be presented to the Court.

24 These actions will involve the discovery of confidential information, and therefore, the  
25 parties have agreed to negotiate an appropriate stipulated protective order to be presented to the  
26 Court.

27 Regarding privileged documents, the parties preliminarily discussed stipulating that the  
28 exchange of privilege logs occur at a date specified after the parties have completed their

1 productions, instead of at the time objections and responses to document requests are served, and  
2 limiting the logging of certain categories, such as communications where the only parties to the  
3 communications are attorneys or communications after the onset of litigation. The parties have  
4 agreed to negotiate an appropriate stipulation.

5 Google's position is that the presumptive limits on discovery under the Federal Rules of  
6 Civil Procedure should apply to this case, with class discovery counting towards the limits, but  
7 excluding expert discovery from the limits.

8 **9. Class Certification.**

9 **Plaintiffs' position:** Plaintiffs intend to move for class certification. In compliance with  
10 Local Rule 16-(b), plaintiffs represent that this action is maintainable as a class action under Rules  
11 23(a) and (b)(1), (2) and (3). Plaintiffs bring this class action on behalf of a class of person or  
12 entities who had a Google AdWords account with Google during the class period and who were  
13 unlawfully charged for advertisements appearing on certain websites, including parked domain and  
14 error pages. This action is suitable for class treatment because all class members were damaged by  
15 the same unlawful and deceptive business practices. All class members are therefore similarly  
16 situated, and were subject to the same allegedly unlawful practices. Plaintiffs are unaware of the  
17 number of class members, but believe it to be in the tens or hundreds of thousands, such that joinder  
18 would therefore be impractical. Plaintiffs have hired experienced class action counsel, and will  
19 protect the interests of the class. As discussed below, plaintiffs propose the following schedule: (1)  
20 plaintiffs' deadline to file a motion for class certification should be 6 months after an answer to the  
21 consolidated complaint is filed; (2) Google's opposition deadline should be 30 days after the filing  
22 of the motion; (3) Plaintiffs' reply deadline should be 30 days after Google's opposition; and (4) the  
23 hearing should be 30 days after the filing of plaintiffs' reply.

24 **Defendant's position:** Google denies that this action is maintainable as a class action, and  
25 will oppose Plaintiffs' motion for class certification because Plaintiffs cannot satisfy all of the  
26 requirements of Rule 23(a) nor any of the requirements of Rule 23(b).

27 Google proposes that: (1) Plaintiffs' deadline to file their class certification motion should be  
28 set 30 days after the close of class discovery; (2) Google's opposition deadline should be set 30 days

1 after the filing of the motion; (3) Plaintiffs' reply deadline should be set 30 days after Google's  
2 opposition; and (4) the hearing be set 30 days after Plaintiffs' reply.

3 **10. Related cases.**

4 The parties are not aware of any additional related cases.

5 **11. Relief**

6 **Plaintiffs' position:**

7 Plaintiffs seek the following relief:

8 (1) An injunction ordering Google to cease and desist from engaging in the unfair,  
9 unlawful, and/or deceptive practices alleged in this action;

10 (2) Restitution and disgorgement on certain causes of action;

11 (3) Compensatory and general damages according to proof on certain causes of action;

12 (4) Special damages according to proof on certain causes of action;

13 (5) Both pre- and post-judgment interest.

14 Plaintiffs are not capable at this time of describing the exact or approximate dollar amount  
15 of relief, which depends upon information exclusively within Google's control.

16 **Defendant's position:**

17 Google denies that Plaintiffs have been harmed or damaged.

18 In light of Plaintiffs' position on the amount of damages and claimed inability to describe  
19 the bases on which damages are calculated, it is premature for Google to describe the bases on  
20 which it contends damages should be calculated if liability is established.

21 Google has not asserted a counterclaim in the three actions in which it has been served,  
22 but reserves its right to do so in the JIT Packaging, Inc. matter and in response to the proposed  
23 consolidated complaint.

24 **12. Settlement and ADR.**

25 On October 15, 2008, all parties met and conferred regarding Settlement and ADR. The  
26 parties agreed that settlement discussion would not be productive until class certification has been  
27 decided, and chose mediation (ADR L.R. 6) as the ADR procedure for these actions.

1           In the three actions in which Google has been served, the parties filed the required ADR  
2 Stipulation selecting mediation (ADR L.R. 6) to occur within 90 days of the Court's order on  
3 Plaintiffs' motion for class certification. The Court approved those stipulations. Google filed its  
4 ADR Certification in each of those cases as well.

5           The JIT Packaging, Inc. action has not yet been served (nor has Google waived service yet),  
6 and therefore, the ADR Stipulation and ADR Certification for that action have not yet been filed.

7 **13. Consent to Magistrate Judge.**

8           The parties do not consent to a magistrate judge to preside over a trial of this matter.

9 **14. Other References.**

10          The parties agree that the case is not suitable for reference to binding arbitration or a special  
11 master. The actions are not suitable for reference to the JPML as all related cases have been filed in  
12 this district and have been transferred to this Court.

13 **15. Narrowing of Issues.**

14          The parties agree that it is premature to discuss expediting the presentation of evidence at  
15 trial or bifurcation. The parties jointly request that these issues be addressed at a further Case  
16 Management Conference to be set after the Court rules on plaintiffs' motion for class certification.

17          **Plaintiffs' position:** Plaintiffs do not propose any narrowing of issues at this time. Plaintiffs  
18 oppose bifurcation of discovery, as discussed above.

19          **Defendant's position:** Google proposes phased class and merits discovery as described  
20 above. Google also intends to move for summary judgment, which may narrow some of the issues  
21 for trial.

22 **16. Expedited Schedule.**

23          The parties do not believe this case is suitable at this time for an expedited schedule.

24 **17. Scheduling.**

25          **Plaintiffs' position:** Plaintiffs propose the following case management schedule. In light of  
26 (1) the anticipated filing by plaintiffs of a consolidated complaint, and (2) the posture of Google  
27 with respect to postponing discovery until Google has responded to the consolidated complaint,  
28 plaintiffs' proposal is limited to a schedule for class certification. Plaintiffs propose that the motion

1 for class certification be filed 6 months after the filing of an answer to the consolidated complaint.  
2 Plaintiffs propose the following schedule for expert discovery relating to class certification: (1)  
3 plaintiffs will file expert reports in support of class certification at the same time that they file their  
4 motion for class certification; (2) Google can conduct expert discovery until the date it files its  
5 opposition to class certification (30 days after the filing of the motion); (3) Google will file its expert  
6 reports in opposition to class certification at the same time that it files its opposition to class  
7 certification (30 days after the filing of the class certification motion); and (4) plaintiffs can take  
8 discovery of defendant's experts until the date that plaintiffs file their reply in support of class  
9 certification. Google's proposal that experts be disclosed 30 days prior to the close of class  
10 discovery, and rebuttal experts disclosed by the close of class discovery, makes no sense, since then  
11 plaintiffs would be required to disclose their experts prior to the filing of their motion for class  
12 certification and initial expert report on class certification issues.

13 After a ruling on plaintiffs' motion for class certification, plaintiffs propose that the parties  
14 meet and confer and submit a proposed pre-trial schedule for the Court's approval, including further  
15 deadlines for fact discovery cut-off, expert discovery cut-off, and dispositive motions. Plaintiffs  
16 anticipate that a trial date could be set within 9 months from a ruling on class certification.

17 **Defendants' position:** Google proposes that Plaintiffs' deadline for filing a motion for class  
18 certification be set nine months after initial disclosures are due, which will also be the class  
19 discovery cut-off, except for expert discovery if either side intends to rely on expert opinion in  
20 support of or in opposition to the certification motion. To the extent the parties intend to rely on  
21 expert opinion, experts should be disclosed 30 days before the close of class discovery. Rebuttal  
22 experts shall be disclosed on or before the class discovery deadline. Expert discovery is to be  
23 completed two weeks before Google's opposition deadline, and for rebuttal experts, two weeks  
24 before Plaintiffs' reply deadline.

25 Plaintiffs and Google propose their respective schedules, which are based on the assumption  
26 that the Court will rule on the motion for consolidation on March 2, 2009. In the event such a ruling  
27 comes later, the schedule would have to be adjusted accordingly.  
28

1	<b>Event</b>	<b>Plaintiffs' Proposed Schedule</b>	<b>Defendant's Proposed Schedule</b>	<b>Schedule set by Court</b>
2	Hearing on Uncontested Motion to Consolidate, and possible order	March 2, 2009	March 2, 2009	
3	Commencement of discovery	March 2, 2009 for commencement of all discovery, including both class certification and merits	June 16, 2009 - initial disclosures and start of class discovery (which includes merits issues necessary to determine Rule 23 requirements)	
4	Deadline for Plaintiffs to file Consolidated Amended Complaint	April 16, 2009	April 16, 2009	
5	Deadline for Defendant to Answer or otherwise respond to Consolidated Amended Complaint	April 30, 2009	June 1, 2009	
6	Class discovery cut-off	October 30, 2009 (six months after defendant answers the consolidated amended complaint) (in the event that defendant does not answer the complaint on April 30, 2009, but files any motions, then this date should be moved accordingly)	March 16, 2010 (nine months after making initial disclosures)	
7				
8				
9				
10				
11				
12				
13				
14				
15				
16				
17				
18				
19				
20				
21				
22				
23				
24				
25				
26				
27				
28				

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18	Experts disclosures re class certification and experts discovery cutoff	<p>Plaintiffs to file initial expert reports on class certification: at same time as filing motion for class certification</p> <p>Defendant's deadline to conduct expert discovery of plaintiffs' experts: at same time as the filing of defendant's opposition to class certification</p> <p>Defendant to file initial expert reports opposing class certification: at same time as defendant files opposition to motion for class certification</p> <p>Plaintiffs' deadline to conduct expert discovery of defendant's experts: at same time as the filing of plaintiffs' reply in support of class certification</p>	<p>Affirmative experts disclosure - February 12, 2010 (approximately one month before class discovery cut-off)</p> <p>Rebuttal experts disclosure- March 16, 2010</p> <p>Affirmative experts discovery cut-off – April 2, 2010</p> <p>Rebuttal experts discovery cut-off – May 3, 2010</p>	
19 20 21 22 23 24 25	Plaintiffs to file Motion for Class Certification	<p>October 30, 2009 (six months after answer to consolidated complaint)</p> <p>(in the event that defendant does not answer the complaint on April 30, 2009, but files any motions, then this date should be moved accordingly)</p>	<p>March 16, 2010 (nine months after making initial disclosures)</p>	
26 27	Defendants to file Opposition to Motion for Class Certification	November 30, 2009 (one month later)	April 16, 2010 (one month later)	

1	Plaintiffs to file Reply to Motion for Class Certification	January 8, 2010 (one month later, plus an extra week due to holidays)	May 17, 2010	
3	Hearing on Motion for Class Certification	February 8, 2010, or as specified by the Court	June 14, 2010	
5	Further Case Management Conference	TBD by Court within 45 days after class certification ruling	TBD by Court within 45 days after class certification ruling	
7	Parties to meet and confer and file Joint Report for further CMC after ruling on motion for class certification to set deadlines for fact discovery, expert discovery, dispositive motions and trial	TBD by Court in advance of further CMC	TBD by Court in advance of further CMC	

12      **18. Trial.**

13      Plaintiffs have demanded a jury trial on all claims triable by jury. Length of trial at this  
14 time is uncertain. Plaintiffs agree that there is no right to jury trial on the claims under  
15 California's Unfair Competition Law or False Advertising Law. Google agrees with plaintiffs  
16 that the length of trial at this time is uncertain and will depend in part on class certification.

17      **19. Disclosure of non-party interested entities or persons.**

18      The parties have filed their respective Disclosure Statements required by Rule 7.1 and  
19 Certification of Interested Entities or Persons required by Local Rule 3-16.

20      Plaintiffs make no further representations in this respect.

21      As required under the General Order, Google restates its disclosure statement and  
22 certification of interested entities:

23      "Defendant Google Inc., by and through its undersigned counsel of record, hereby certifies  
24 pursuant to Federal Rule of Civil Procedure 7.1 that it does not have a parent corporation and that no  
25 publicly held corporation owns 10% or more of its stock."

26      "Pursuant to Civil L.R. 3-16, the undersigned certifies that as of this date, other than the  
27 named parties, there is no such interest to report."

1   **20. Other matters affecting status or management of the case.**

2   The parties identify none at this time.

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1 Dated: February 20, 2009

SCHUBERT JONCKHEER KOLBE &  
KRALOWEC LLP

3 By: \_\_\_\_\_/s/Dustin L. Schubert  
4 Dustin L. Schubert

5 ROBERT C. SCHUBERT  
6 WILLEM F. JONCKHEER  
7 KIMBERLY A. KRALOWEC  
DUSTIN L. SCHUBERT

8 *Counsel for Plaintiff Hal Levitte*

9 GUIDO SAVERI S.B.N. 22349  
10 R. ALEXANDER SAVERI S.B.N. 173102  
CADIO ZIRPOLI S.B.N. 179108  
11 SAVERI & SAVERI, INC.  
706 Sansome Street  
San Francisco, CA 94111  
12 Telephone: (415) 217-6810

13 By: \_\_\_\_\_/s/Cadio Zirpoli  
14 Cadio Zirpoli

15 *Counsel for Plaintiffs Pulaski & Middleman, LLC  
and JIT Packaging, Inc.*

16 TERRY GROSS S.B.N. 103878  
17 ADAM C. BELSKY S.B.N. 147800  
18 MONIQUE ALONSO S.B.N. 127078  
19 GROSS BELSKY ALONSO LLP  
180 Montgomery Street, Suite 2200  
San Francisco, California 94104  
20 Telephone: (415) 544-0200

21 *Counsel for Plaintiffs Pulaski & Middleman, LLC*

22 ROBERT FOOTE (To be admitted *Pro Hac Vice*)  
CRAIG S. MIELKE (To be admitted *Pro Hac  
Vice*)  
FOOTE, MEYERS, MIELKE & FLOWERS, LLC  
28 North First Street, Suite 2  
Geneva, IL 60134  
25 Telephone: (630) 232-6333

26 *Counsel for Plaintiff JIT Packaging, Inc.*

KATHLEEN C. CHAVEZ  
CHAVEZ LAW FIRM, P.C.  
28 North First Street, Suite 2  
Geneva, IL 60134  
Telephone: (630) 845-8982

*Counsel for Plaintiff JIT Packaging, Inc.*

PETER L. CURIE  
THE LAW FIRM OF PETER L. CURIE, P.C.  
536 Wing Lane  
St. Charles, IL 60174  
Telephone: (630) 862-1130

*Counsel for Plaintiff JIT Packaging, Inc.*

BRIAN S. KABATECK S.B.N. 152054  
RICHARD L. KELLNER S.B.N. 171416  
ALFREDO TORRIJOS S.B.N. 222458  
KABATECK BROWN KELLNER LLP  
644 South Figeroa Street  
Los Angeles, CA 90017  
Telephone: (213) 217-5000

By: \_\_\_\_\_ /s/Alfredo Torrijos  
Alfredo Torrijos

*Counsel for Plaintiff RK West, Inc.*

Dated: February 20, 2009

COOLEY GODWARD KRONISH LLP  
MICHAEL G. RHODES (116127)  
LEO P. NORTON (216282)  
PETER J. WILLSEY (*pro hac vice*)

By: \_\_\_\_\_ /s/Michael G. Rhodes  
Michael G. Rhodes

Attorneys for Defendant GOOGLE INC.

## ATTESTATION OF FILER

I, Dustin L. Schubert, hereby attest that concurrence in the filing of the document has been obtained from each of the other signatories.

1 Dated: February 20, 2009

SCHUBERT JONCKHEER KOLBE & KRALOWEC LLP

2 By: /s/Dustin L. Schubert  
3 Dustin L. Schubert

4 *Counsel for Plaintiff Hal Levitte*

5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

